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No. 87-1490

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN E. MALLARD, Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al., Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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November 16, 1988

QUESTION PRESENTED

Is a federal court empowered by 28 U.S.C. Section 1915(d) to require an unwilling attorney to represent a person making a request for counsel thereunder?

LIST OF PARTIES

The parties to the proceedings below were the petitioner John E. Mallard and the respondents United States District Court for the Southern District of Iowa, Mark Allen Traman, Michael D. Woods, Jr., Charles O. Reese, Steve Parkin, Robert W. Umthun, Robert Staub, Myron Mason, Mike Booten, Charles Harper, Ronald G. Welder, and Harry Grabowski

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OPINIONS BELOW

The Court of Appeals for the Eighth Circuit did not write an opinion, and its order is retyped at Pet. App., p. 1a.

The ruling of the United States District Court for the Southern District of Iowa (Vietor, C.J.) has not been

reported. It is retyped at Pet. App., p. 2a. The District Court ruling relies, in part, on an opinion rendered by the District Court in Coburn V. Nix, Civ. No. 86-716-B (S.D. Iowa 1987). The Coburn opinion has not been reported but is retyped at Opp. App., p. 1a.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. Section 1983, plaintiffs brought suit in the case of Mark Allen Traman et al. v. Steve Parkin et al., Civil No. 87-317-B, in the United States District Court for the Southern Distr ct of Iowa. Plaintiffs asked to have a lawyer appointed and, pursuant to 28 U.S.C. Section 1915(d), the petitioner was appointed to represent plaintiffs. On October 27, 1987, the District Court denied the petitioner's motion to dismiss his appointment. On December 7, 1987,

the Eighth Circuit denied the petitioner's application for a writ of mandamus directing the District Court to grant the petitioner's motion to dismiss his appointment. The petition for a writ of certiorari was filed on March 5, 1988 and was granted on October 3, 1988.

The jurisdiction of this Court to reveiw the judgment of the Eighth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

28 U.S.C. Section 1915. Proceedings in forma pauperis

(d) The Court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

STATEMENT OF THE CASE

This is a suit challenging the

authority of the District Court under 28 U.S.C. Section 1915(d) to compel petitioner John E. Mallard, an attorney admitted to practice before said court, to undertake a certain representation. The District Court denied Mallard's motion to dismiss his appointment, holding that Section 1915(d) empowers the court to require an unwilling attorney to serve as counsel. The Court of Appeals for the Eighth Circuit affirmed this ruling by denying Mallard's application for a writ of mandamus.

The Court of Appeals in Nelson v. Redfield Lithograph Printing, 728 F.2d 1003, 1005 (8th Cir. 1984), directed the District Court to prepare a list of attorneys practicing in the district who would be available for pro bono appointments under Section 1915(d). In response to this directive, the District Court prepared and continues to maintain

a list which includes all attorneys admitted to practice before the District Court and in good standing who have appeared as counsel in a nonbankruptcy federal case in the past five years (Opp. App. 2a-3a). The District Court forwards the list to the Volunteer Lawyers Project, a joint venture of the Legal Services Corporation of Iowa and the Iowa State Bar Association, which assists the District Court in placing civil pro bono assignments (J.A. 14-15). The Volunteer Lawyers Project receives the list, eliminates the names of those attorneys who have signed up with the Volunteer Lawyers Project to provide voluntary service through programs other than the federal referral program (J.A. 15), and then, from the names remaining on the list, selects attorneys for Section 1915(d) appointments. The Volunteer

Lawyers Project is considering a change in its current policy of striking the names of its volunteer attorneys from the list "since the logical extension of this current policy is that all attorneys could sign up for the Volunteer Lawyers Project and no one would be left to accept federal referrals" (J.A. 15).

Petitioner Mallard is a partner in the law firm of Marcus & Mallard, P.C., Fairfield, Iowa, where he practices business law (J.A. 32-33). Mallard sought admission to practice before the District Court as an accommodation to his firm, so that it could appear as counsel of record in certain civil lawsuits which were to be handled by Peter Jenkins, an experienced litigator who had become "of counsel" to the firm (J.A. 34-35). Jenkins had not yet been admitted to the Iowa bar and, accordingly was not yet in a position to

apply for admission to practice before the District Court (J.A. 35).

Petitioner Mallard entered an appearance in the District Court in February, 1987 (J.A. 35) and was contacted by the Volunteer Lawyers Project in June, 1987 to undertake the representation of the plaintiffs in the case of Mark Allen Traman et al. v. Steve Parkin et al., Civil No. 87-317-B, in the United States District Court for the Southern District of Iowa (J.A. 4-5). Mallard never agreed to represent the plaintiffs but did receive their file in order to learn more about the case (J.A. 5). The case involves two indigent inmates of the Iowa State Penitentiary at Fort Madison, Iowa, and one indigent former inmate, who had, collectively, brought an action under 42 U.S.C. Section 1983. The inmates complained that

various prison guards and officials had filed false disciplinary reports against them, mistreated them physically, and endangered their lives by exposing their role as informants.

In June, 1987, Mallard filed a Motion To Withdraw on the grounds that (i) representation of the plaintiffs would involve substantial discovery by deposition and a trial with many parties and witnesses, (ii) counsel for plaintiffs would need to examine and cross-examine numerous parties and witnesses, and (iii) Mallard was not competent to undertake such representation (J.A. 6-8). Mallard was involved primarily in a business and securities law practice, and his courtroom experience was limited to the representation of creditors in debt collection and bankruptcy proceedings during the period from May, 1981 through April, 1983

(J.A. 30-31). During this time, Mallard was involved in one deposition relating to the foreclosure of a residence and one trial in which the sole issue of fact for determination by the court was the value of certain real property (J.A. 31). Mallard's motion to withdraw was submitted to a U.S. Magistrate who denied the motion, thereby ruling that Mallard was competent.

In July 1987, Mallard appealed the Magistrate's denial of the motion to withdraw and also moved to dismiss the appointment on the ground that 28 U.S.C. Section 1915(d) does not empower the District Court to require an unwilling attorney to represent a person making a request for counsel thereunder. In connection with such appeal and motion, Mallard advised the District Court that he did not like "the role of confronting

other persons in a litigation setting, accusing them of misdeeds, or questioning their veracity" (J.A. 38). The District Court affirmed the ruling of the Magistrate finding that "Mallard does have litigation experience. Even without litigation experience Mallard would not necessarily be incompetent. Therefore, Mallard is not incompetent" (Pet.App. 3a).

The District Court also denied Mallard's motion to dismiss the appointment, holding that "Section 1915(d) empowers the court to appoint attorneys to represent indigent civil litigants" (Pet.App. 3a). In the context in which the District Court ruled, its usage of the term "appoint" was synonymous with the term "require" rather than the term "request," which appears in the text of Section 1915(d).

In November, 1987, Mallard sought

appellate review of the District Court's holding with respect to its appointment power under Section 1915(d), by applying to the Court of Appeals for a writ of mandamus directing the District Court to grant Mallard's motion to dismiss his appointment. The Court of Appeals denied Mallard's application for a writ of mandamus, thereby effectively holding that a federal court has authority under Section 1915(d) to compel an unwilling attorney to represent a person making a request for counsel. The Court of Appeals did not write an opinion in support of its judgment (Pet.App. 1a).

SUMMARY OF ARGUMENT

1. The plain meaning of the word "request" as used in 28 U.S.C. Section 1915(d) indicates that Congress intended to authorize the federal courts only to appoint volunteer attorneys. The

"request" language used by Congress in Section 1915(d) when contrasted with the language appearing in other federal statutes authorizing the "appointment" of counsel, further supports a statutory construction to the effect that the federal courts are not empowered by Section 1915(d) to compel an unwilling attorney to undertake a representation. In addition, an analysis of other statutory and constitutional provisions for mandatory appointment of counsel reveal that such provisions are addressed to the protection of compelling legal interests, such as due process rights, whereas Section 1915(d) is directed only to the provision of counsel to a class of persons, i.e. indigent persons, without regard to the importance of any legal interest involved.

2. Section 1915(d) should be construed as authorizing a court only to

"request" an attorney to voluntarily undertake a representation because such a construction is supported by public policy considerations which favor voluntarism rather than mandatory compelled service. Voluntarism should be favored because, among other reasons, voluntary services programs match the specialized skills of the attorney with the particular needs of the client, and provide greater efficiency than mandatory appointment programs.

3. Section 1915(d) must be construed as authorizing a court only to "request" an attorney to voluntarily undertake a representation because any finding of a mandatory appointment power would raise serious doubts regarding the constitutionality of Section 1915(d). A mandatory appointment would infringe an unwilling attorney's freedom of speech

because speech is an integral part of a legal representation, and the government cannot require an attorney to use his speech in a manner that is contrary to the dictates of his conscience, as a condition to admission to practice before the federal courts.

A mandatory appointment would violate an unwilling attorney's right to due process and equal protection of law because the list from which appointments are made has been compiled in an arbitrary manner which creates an under-inclusive subclass of attorneys who must bear the burden of all Section 1915(d) appointments. In addition, attorneys as a class are entitled to protection against the arbitrarily assigned, unequal burden of being required to provide a public benefit at their sole expense.

A mandatory appointment under Section 1915(d), which does not provide

for any compensation, constitutes an unconstitutional taking of property for public use. Courts have formerly held that (i) there is a traditional professional obligation of attorneys to accept uncompensated court appointments and (ii) this obligation prevents attorneys from establishing a "taking." However, a revisionist historical analysis indicates that there is no such widely-shared, traditional obligation which prevents attorneys from asserting their rights under the "takings" clause of the Fifth Amendment.

ARGUMENT

I

THE PLAIN MEANING OF THE WORD "REQUEST" AS USED IN 28 U.S.C. SECTION 1915(d) PREVENTS THE FEDERAL COURT FROM RELYING THEREON TO 'REQUIRE" AN UNWILLING ATTORNEY TO UNDERTAKE A REPRESENTATION

28 U.S.C. Section 1915(d) provides, in relevant part, that "[t]he court may request an attorney to represent any such

person unable to employ counsel." (Emphasis added).

Among the Courts of Appeals which have construed Section 1915(d) in the context of determining the court's authority to require an unwilling attorney to represent an indigent person, the Eighth Circuit stands alone in finding a power to require an unwilling attorney to serve as counsel. The Fifth, Sixth, Seventh, and Ninth Circuits have uniformly held that the federal courts have no power to make a mandatory appointment under Section 1915(d), but can only "request" an attorney to undertake the representation. United States v. 30.64 Acres of Land, 795 F.2d 796, 801 (9th Cir. 1986) ("In our view, 28 U.S.C. Section 1915(d) does not authorize appointment of counsel to involuntary service"); Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982)

("A lawyer should not be conscripted into a Section 1983 case simply because he is a member of the bar, but this does not mean that all members of the bar should be denied the opportunity to assist the cause of justice under the authority of a court appointment"); Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982), cert. denied, 459 U.S. 1214 (1983) ("A court has the authority only to request an attorney to represent an indigent, not to require him to do so") (emphasis in original); Reid v. Charney, 235 F.2d 47 (6th Cir. 1956) ("The court . . . has the statutory power only to request an attorney to represent a person unable to employ counsel . . . . While the refusal of local counsel to serve was regrettable, the court could hardly do more than was done under the circumstances").

The Ninth Circuit, in the well reasoned opinion of United States v. 30.64 Acres of Land, 795 F.2d 796 (9th Cir. 1986), held that an unwilling attorney cannot be compelled to represent an indigent person under Section 1915(d) based upon the plain meaning of the term "request," especially when the use of tnat term is contrasted with the language used in the Constitution and other federal statutes authorizing appointment of counsel.

> Most persuasively, the plain language of the statute states that a court may "request" counsel for indigents. See 28 U.S.C. Section 1915(d). Statutes that have been construed as authorizing "appointment" of counsel commonly use such words as "appointment" or "assign." See, e.g., 18 U.S.C. Section 3006A(b) (1982) ("the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel"); 25 U.S.C. Section 1912(b) (1982) ("In any case in which the court determines indigency, the parent or Indian custodian shall

> have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child."); 42 U.S.C. Section 1971(f) (1982) ("the court before which [a person charged with contempt under 42 U.S.C. Section 1975d(g)] is cited or tried . . . shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire. . . ."); 42 U.S.C. Section 2000e-5(f)(1)(1982) ("Upon application by the complainant [in a Title VII action] and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant. . . ."); see also Fed. R. Crim. P. 44 ("Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings. . . .").
>
> . . .
>
> We also note that the constitutional requirements for civil actions differ significantly from those for criminal actions in which courts may appoint counsel. Federal criminal defendants facing imprisonment are entitled to representation of counsel, see, e.g., U.S. Const. amend. VI; Johnson v. Zerbst, 304 U.S. 458, 462, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938), and the power of courts to appoint counsel for such defendants is thus necessary to

> preserve their constitutional rights. There is normally, however, no constitutional right to counsel in a civil case, see Lassiter v. Department of Social Services, 452 U.S. 18, 25-27, 101 S. Ct. 2153, 2158-60, 68 L.Ed.2d 640 (1981); Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971). But cf. Lassiter, 452 U.S. at 27-32, 101 S.Ct. at 2159-62 (suggesting that due process may in some cases require appointment of counsel for indigent parents in child custody termination proceedings). The failure of a court request actually to secure counsel therefore would not normally prejudice the civil litigant's constitutional rights.

United States v. 30.64 Acres of Land, 795 F.2d 796, 801 (9th Cir. 1986).

Neither the Eighth Circuit nor the District Court below has rendered an opinion discussing the "request" language of Section 1915(d) or considering the likelihood that Congress intended to empower federal courts only (i) to request an attorney to undertake the representation of an indigent and (ii) to appoint an attorney who has voluntarily accepted the request. The Eighth Circuit

has rendered an opinion, however, which indicates that it does not see any need to distinguish the "request" language in Section 1915(d) from the appointment language used in the statutes involving habeas corpus and Title VII civil rights actions. 18 U.S.C. Section 3006A(b); 42 U.S.C. Section 2000e-5(f)(1). The Eighth Circuit has stated as follows:

> The district court ruled that it had no power to appoint counsel to represent an indigent in civil cases. This ruling overlooks the express authority given it in 28 U.S.C. Section 1915 to appoint counsel in civil cases. This court and other courts of appeals regularly make these appointments in habeas corpus and civil rights cases; district courts throughout the country do the same.

Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971) (footnote omitted; emphasis in original). See Nelson v. Redfield Lithograph Printing, 728 F.2d 1003, 1005 (8th Cir. 1984) (appointing counsel for Title VII case under 28

U.S.C. Section 1915(d) without explaining why 42 U.S.C. Section 2000e-5(f)(1) was not controlling).

As mentioned above, the Eighth Circuit fails to consider the plain meaning of the word "request" and, in particular, the contrast between the use of that word in Section 1915(d) and the use of the word "appoint" in other federal statutes (pp. 18-19, supra). It is clear that Congress and the drafters of the Constitution have singled out certain rights which are so highly regarded that legal representation must be made available, and a mandatory appointment of counsel or other provision for counsel is justified.[1] With this understanding in mind, it is also clear that Congress, in using the plain

[1] Certain rights, such as the right under the Sixth Amendment to the assistance of counsel in the defense of

language that a court may "request" counsel for indigents, never intended to provide indigents or indigent holders of Section 1983 claims with an extraordinary assurance of access to legal representation.

Such a manner of statutory construction accords due respect to the rights of Congress, as contrasted with the rights of the courts, to determine those instances (not involving any right to counsel based upon constitutional provisions assuring due process of law) which justify mandatory appointment of

[1] (continued from prior page) criminal prosecutions, are undoubtedly based upon a compelling interest of the defendant to have access to counsel. In those instances where the defendant is indigent and unable to retain counsel, our government also has a compelling interest in providing counsel as a key ingredient of our system of justice. In such instances, a mandatory appointment of counsel is justified provided that the mandatory appointment does not infringe any constitutionally protected right of the attorney who is appointed. See Section III below.

counsel. While both the courts and Congress are involved in the regulation of attorneys, it appears that Congress is the appropriate body to regulate the practise of law for the purpose of effecting a distribution or redistribution of legal services in society.

While Congress has enacted Section 1915(d) as a means of encouraging cooperation between the bench and the bar in facilitating the representation of indigent persons, Congress has not provided for mandatory appointment of attorneys to serve indigent persons. Consequently, an attorney may refuse a request to undertake a certain representation under Section 1915(d).

II

SOUND PUBLIC POLICY CONSIDERATIONS SUPPORT THE ESTABLISHMENT OF A VOLUNTARY ATTORNEY APPOINTMENT PROGRAM UNDER 28 U.S.C. SECTION 1915(d) AND THESE POLICY CONSIDERATIONS SHOULD NOT BE FRUSTRATED BY EFFORTS TO COMPEL "VOLUNTARISM"

The Eighth Circuit supports its holding that attorneys may be compelled to accept an "appointment" made under 28 U.S.C. Section 1915(d), by referring to the professional duty of the bar to provide public service. See Peterson v. Nadler, 452 F.2d 754, 758 (8th Cir. 1971).

It is clear that attorneys have committed themselves to make legal counsel available and to aspire to assist persons who do not have the financial ability to employ counsel. The Iowa Code of Professional Responsibility for Lawyers states:

> Financial Ability to Employ Counsel: Persons Unable to Pay Reasonable Fees
>
> EC 2-26. A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay

a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

EC 2-27. Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional experience or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

That lawyers should perform pro bono services is not in dispute. The issue

here is whether lawyers will continue to enjoy their traditional freedom to choose the circumstances under which they perform such public service.

There are good reasons for allowing an attorney to choose the public service he will provide rather than allowing a court to dictate the services which must be performed.

First, only a system which accords an attorney the right to choose his service is truly voluntary. By definition, voluntarism involves services given freely and without compulsion.

Voluntarism is highly valued and respected in American society. Because volunteers give freely of their time, and involve themselves in causes which interest them, volunteers act with conviction. In many instances, volunteers also possess or develop special

knowledge or experience relating to the subjects of their interest. The combination of conviction and skill in action ensures that voluntary services are not only rewarding to the volunteer but also valuable to the beneficiaries of the voluntary services.

Because voluntarism is based upon freedom of choice, voluntarism reinforces and fortifies the volunteer's freedom of speech, whereas compulsion to act interferes with such liberty (see Section III(A) pp. 37-45 infra).

In the interest of promoting volunteerism as a public policy, an attorney should not be compelled to undertake the cause of a particular indigent person if the attorney has greater interest in other causes. An attorney's preferences of association with certain causes should be respected. Otherwise, compelling an attorney to

"volunteer" his services for a particular cause would transform pro bono work from an activity based upon the "giving" of services to an activity with certain indicia of involuntary servitude.

A second public policy consideration in favor of a holding that Section 1915(d) confers only a voluntary appointment power is the policy of designing programs to ensure maximum efficiency. An attorney may have expertise in one area of law but not in another. There would be little efficiency if a bankruptcy expert were assigned to try a case under 42 U.S.C. Section 1983.

As compared with a program based upon mandatory appointments, a voluntary program provides greater assurance that attorneys will be matched with clients to whom they can render competent and

effective service. A court which proposes to make a mandatory appointment of counsel may be well acquainted with the legal needs of the indigent person but the court cannot know the legal skills of the attorney that it proposes to appoint as well as the attorney knows his or her own skills. In this regard, it is significant to note that the mandatory Section 1915(d) appointment program administered by the Volunteer Lawyers Project on behalf of the District Court does not even attempt to match specialized legal skills with particular legal needs, but rather selects attorneys for appointment based upon a lottery system.

At a minimum, the volunteer attorney should be competent. Iowa Code of Professional Responsibility for Lawyers, Disciplinary Rule 6-101(A)(1) provides that: "A lawyer shall not handle a legal matter which he knows or should know that

he is not competent to handle, without associating with him a lawyer who is competent to handle it." Consequently, a lawyer should not be compelled to undertake a particular legal representation if he does not feel competent to handle it.

In the instant case, Mallard resisted his appointment to serve as counsel for plaintiffs on the ground that he had little litigation experience and no litigation experience in cases of this kind, rendering him incompetent to undertake the representation. In lieu of representing the plaintiffs, Mallard volunteered to perform other service which he felt competent to provide, such as debt counseling or bankruptcy, but the Volunteer Lawyers Project and District Court refused Mallard's offer.

When Mallard moved to withdraw from the appointment, the District Court

denied his motion. While the District Court held that Mallard was competent, it is clear from Mallard's general lack of litigation experience that his skills would fall at the low end of the range of skills possessed by all members of the federal bar who were eligible for referrals under Section 1915(d).

The mandatory appointment system in effect in the District Court is inefficient by reason of its failure to acknowledge specialized legal skills and allocate them accordingly. As a consequence of this inefficiency, the plaintiffs in the underlying case might not receive effective assistance of counsel and the petitioner might be subjected to suit for malpractice. Ferri v. Ackerman, 444 U.S. 193 (1979).

In conclusion, sound public policy considerations arising out of respect for voluntarism and concern for efficient and

competent representation of indigent persons support a finding that Section 1915(d) is best construed as providing for voluntary attorney appointments.

III

28 U.S.C. SECTION 1915(d) MUST BE CONSTRUED TO PROVIDE FOR VOLUNTARY ATTORNEY APPOINTMENTS BECAUSE ANY FINDING OF MANDATORY APPOINTMENT POWER AND EXERCISE OF SUCH POWER TO COMPEL AN UNWILLING ATTORNEY TO SERVE AS COUNSEL WOULD INFRINGE CERTAIN CONSTITUTIONALLY PROTECTED RIGHTS OF THE ATTORNEY AND RAISE SERIOUS DOUBTS REGARDING THE CONSTITUTIONALITY OF SECTION 1915(d).

Mandatory appointment under Section 1915(d) causes an infringement of an unwilling attorney's constitutionally protected rights and raises serious doubts regarding the constitutionality of Section 1915(d). See Sections III(A) through (C), pp. 37-62 infra. "When the validity of an act of Congress is drawn in question, . . . it is a cardinal principle that this Court will first ascertain whether a construction of the

statute is fairly possible by which the question may be avoided." Ashwander v. Valley Authority, 297 U.S. 288, 348 (1936) (Brandeis, J. concurring). See National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1978); Machinists v. Street, 367 U.S. 740, 749 (1961). The elimination of any element of compulsion under Section 1915(d), through a finding that such law empowers the federal court only to "request" an attorney to undertake a representation which the attorney may refuse, would ensure the constitutionality of Section 1915(d).

The argument that Section 1915(d) must be construed to avoid serious doubts regarding its constitutionality was not presented to the Eighth Circuit or the District Court below or described in the Petition for Certiorari to this Court.

However, the statement of the question presented in the Petition for Certiorari is "deemed to comprise every subsidiary question fairly included therein." Supreme Court Rule 21.1(a). The new argument is clearly relevant to the resolution of the question presented, i.e. whether Section 1915(d) can be fairly construed as empowering a federal court to require an unwilling attorney to undertake a certain representation. Consequently, the arguments made in this Section III are "fairly included" in this brief. Dewey v. Des Moines, 173 U.S. 193, 198 (1898) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed"); Illinois v. Gates, 462 U.S. 213, 248 (1983) (White, J. concurring) (citing Dewey and stating "We have never suggested that the jurisdictional stipu-

lations of Section 1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below").

Even when an issue (as distinguished from an argument supporting an issue) has not been presented to the courts below or discussed in the petition for certiorari, this Court has reserved the power to address the new issue in appropriate circumstances. Vance v. Terrazas, 444 U.S. 252, 258-59 n.5 (1980). Cases presenting "appropriate circumstances" have generally involved one or more of the following factors: (i) origination in federal court as distinguished from state court; (ii) interpretation of federal law as distinguished from state law; (iii) presence of sufficient facts in the record to allow for a fair and intelligent decision on the new issue; (iv)

opportunity for opposing parties to present briefs on the new issue; and (v) relevance of the new issue to an intelligent resolution of the case. See generally R. Stern & E. Gressman, Supreme Court Practice, Sections 3.24, 6.25, and 6.26 (6th Ed. 1986). All of the foregoing factors are present in the instant case. Consequently, not only are the new arguments presented herein "fairly included" in support of the question presented in the Petition for Certiorari, but "appropriate circumstances" also exist for a full and fair consideration of these new arguments.

A. Compelling an Attorney To Undertake a Certain Representation Violates the Attorney's Freedom of Speech

The Respondent District Court appointed Petitioner Mallard to represent the plaintiffs in the case of Mark Allen Traman et al. v. Steve Parkin et al.,

Civil No. 87-317-B, and, in response to Mallard's motion to dismiss the appointment, held that 28 U.S.C. Section 1915(d) empowers the District Court to compel Mallard to undertake such representation, presumably under penalty of forfeiture and cancellation of Mallard's admission to practice before the District Court. But the government cannot condition a benefit, such as admission to practice before the federal courts, on the relinquishment of a constitutional right. Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding that admission to state bar may not be conditioned upon the surrender of a First Amendment right to advertise services and fees); Baird v. State Bar of Arizona, 401 U.S. 1 (1970) (holding that admission to state bar may not be conditioned upon an individual's views, beliefs, or associations); Sherbert v. Verner, 374 U.S. 398

(1963) (holding that unemployment compensation cannot be conditioned on an infringement of free exercise of religion).

The District Court seeks to compel Mallard to represent the plaintiffs in the underlying action as a condition to maintaining his admission to practice before the District Court. But this compelled representation of plaintiffs is an unconstitutional condition because it violates Mallard's First Amendment right to be free in his choices and expressions of speech.

The services of an attorney are centered around the use of speech and it is no coincidence that attorneys commonly refer to their service of clients as "representation." If Mallard is compelled to represent the plaintiffs, there can be no question but that he must

formulate ideas and exert his speech.

The record in this case demonstrates tha Mallard (i) believes he is not competent to represent the plaintiffs and (ii) does not like the role of confronting other persons in a litigation setting, accusing them of misdeeds, or questioning their veracity. In light of these views and beliefs, Mallard cannot be compelled to represent the plaintiffs because such representation necessarily requires the exercise of his speech (i) against his will (in light of his belief that he is not competent to undertake the representation) and (ii) in a manner that is contrary to his good conscience (in light of his dislike for confrontational and accusatory speech). Elfbrandt v. Russell, 384 U.S. 11 (1966).

In Elfbrandt, this Court held that a state employee could not be required to take a loyalty oath, because the oath

included a statement swearing to "defend" the state against enemies, and the petitioner could not in good conscience affirm that statement. Since the holding in Elfbrandt protects individuals against any requirement to recite an oath, it must also protect Mallard against any requirement to speak against his conscience or to formulate the ideas and statements which comprise the objectionable "oath."

In Bates v. State Bar of Arizona, 433 U.S. 340 (1977), this Court held that the First Amendment prohibits the government from conditioning admission to the bar upon an infringement of an attorney's right to engage in commercial forms of speech. Since commercial forms of speech are generally accorded less protection then ideational forms of speech, it follows from the holding in

Bates that admission to practice before the federal bar cannot be conditioned on an infringement of ideational forms of speech, as in the instant case.

In Baird v. State of Arizona, 401 U.S. 1, 7-8 (1971), this Court held (i) that "the practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character" and (ii) that an individual's views, beliefs, and associations are protected from judgmental findings by the state. To give effect to these holdings, this Court also held that the state cannot inquire about such views, beliefs or associations "to lay a foundation for barring an applicant from the practice of law." When this reasoning is applied to the instant case it follows that (a) Mallard's views and beliefs must be respected and (b) Mallard's expressions of speech (or non-speech) based upon his

views and beliefs are protected from judgmental findings by the government. Consequently, the District Court cannot compel Mallard to undertake the representation of plaintiffs and engage in certain speech, under penalty of forfeiture and termination of his admission to the federal bar.

The foregoing analysis demonstrates that a mandatory appointment power under Section 1915(d), as applied to the appointment of Mallard, would infringe Mallard's freedom of speech. However, before any judgment can be rendered as to whether this infringement is unconstitutional, this Court must consider whether there is any compelling governmental interest which justifies the interference with Mallard's First Amendment rights. As noted above (Section I, pp. 22-23 supra), there is no compelling

governmental interest in providing counsel under Section 1915(d) to indigents in civil lawsuits. But cf. U.S. Const. amend. VI (providing a right to counsel in criminal prosecutions). Even if this Court were to find a compelling governmental interest in providing counsel to indigents (or indigent inmates holding Section 1983 claims, such as the plaintiffs in the underlying action), the government would still not be able to justify the interference with Mallard's First Amendment rights because "less restrictive alternatives" are available. Counsel might be provided to indigent persons by governmental agencies, legal services corporations, or members of the private bar who have no objection to providing the type of representation that is sought.

In conclusion, a finding of mandatory appointment power under Section

1915(d) and exercise of that power to require Mallard to act as counsel to the plaintiffs herein would infringe Mallard's freedom of speech and raise serious doubts regarding the constitutionality of Section 1915(d). To avoid a judgment on the validity of Section 1915(d), this Court should construe said statute as authorizing only voluntary attorney appointments.

B. Compelling a Subclass of All Qualified Attorneys To Assume the Burden of Section 1915(d) Appointments Denies Due Process and Equal Protection of Law To the Attorneys Within the Subclass

In compiling a list of the names of attorneys practising in the United States District Court for the Southern District of Iowa who would be available for appointments under 28 U.S.C. Section 1915(d), the District Court and the Volunteer Lawyers Project have determined

to eliminate from the list the names of those attorneys who (i) have not appeared as counsel in a nonbankruptcy federal case in the past five years or (ii) have signed up with the Volunteer Lawyers Project to provide voluntary service through programs other than the federal Section 1915(d) referral program.

The effect of the decisions to eliminate the names of certain attorneys is to create a subclass of attorneys who are required to bear the burden of all Section 1915(d) appointments. Since the purpose of Section 1915(d) is to achieve a positive public good, one would ordinarily expect the courts to administer the program so that Section 1915(d) appointments are shared by all qualified members of the federal bar of that district, especially when the District Court construes appointment made under Section 1915(d) to be mandatory.

The list of attorneys used for making Section 1915(d) appointments is "under-inclusive" when considered from the standpoint of all qualified attorneys admitted to practice at the federal bar of the district. First, the list excludes all persons who are involved exclusively in a bankruptcy practice, even though the District Court, in ruling on Mallard's motion to withdraw on grounds of incompetency (i) found Mallard to be competent based upon his past litigation experience in bankruptcy and state court debt collection matters and (ii) reasoned that an attorney would not necessarily be incompetent even if he had no litigation experience. Based upon this standard for competence, it is clear that there are many attorneys, especially those with bankruptcy practices who have been involved in numerous adversary pro-

ceedings in bankruptcy, who are qualified for Section 1915(d) assignments but have not been included on the list.

Second, the list excludes the names of all attorneys who have signed up with the Volunteer Lawyers Project to provide other forms of public service. This exclusion has created such concern for an exodus of qualified attorneys that the Volunteer Lawyers Project has considered ending the exclusion "since the logical extension of this current policy is that all attorneys could sign up for the Volunteer Lawyers Project and no one would be left to accept federal referrals" (J.A. 15).

The Fifth amendment guarantees due process of law and the concept of due process includes within it the concept of equal protection. See Bolling v. Sharpe, 347 U.S. 497 (1954). The equal protection doctrine does not prevent

classification but "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). This rational basis test applies unless the denial of equal protection relates to a fundamental right or a suspect class, in which case a strict scrutiny test or sliding scale test is applied to determine whether the unequal treatment is justified.

The ability to practice law is not a fundamental right and attorneys are not a suspect class, but the subclass of attorneys listed by the District Court and Volunteer Lawyers Project is a suspect class based upon its non-

participation in the Volunteer Lawyers Project. The Volunteer Lawyers Project has effectively determined that attorneys who provide voluntary services through it will be given credit for such service and will be exempted from being compelled to serve under Section 1915(d), but attorneys who choose to provide voluntary service on their own or through some other agency do not receive any similar credit. Because the Volunteer Lawyers Project has clearly discriminated in favor of its own volunteers, the non-affiliated attorneys become a suspect class.

The unequal burden on Mallard and other similarly situated attorneys clearly fails the strict scrutiny test because the District Court, in administering appointments under Section 1915(d), could easily take steps to correct the under-inclusive

classification. For the same reason, the under-inclusive classification is arbitrary and fails the rational basis test. Even though there exists some relation between the means of mandatory court appointments and the end of providing a public benefit in the form of increased representation to indigent persons, this relationship becomes rational only when the court appointments are directed to all persons who are similarly circumstanced. Royster, 253 U.S. at 415.

The equal protection analysis also applies to protect attorneys as a class from being burdened with delivering a public benefit at their sole expense since there is no provision for compensation under Section 1915(d)[2]. The Cali-

2 This statement assumes that attorneys incur "expense" when they are required to perform services for no

fornia Supreme Court has reasoned as follows: "[t]o charge the cost of operation of state functions conducted for public benefit to one class of society is arbitrary and violates the basic constitutional guarantee of equal protection of law". In re Jerald C., 36 Cal.3d 1, 6 (1984). See Cunningham v. Superior Court, 176 Cal.App.3d 349, 362 (1986) (citing the quoted passage from Jerald and holding that attorneys as a class are denied equal protection of law when they are required to represent indigents without compensation).

Based upon the foregoing equal protection analysis, this Court must avoid construing Section 1915(d) as

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2 (continued from prior page) compensation. It has been argued that there is no expense involved because attorneys have a professional obligation to perform such services. This argument is considered and rejected at Section III(C), pp. 54-62 infra.

authorizing mandatory appointments of attorneys because such a construction would raise serious doubts regarding the constitutionality of Section 1915(d). In addition, since the purpose of the foregoing equal protection analysis is to consider its impact on statutory construction, it should be noted that this Court need not engage in a rigorous exercise to determine whether there might be justifying rationales for the unequal treatment of Mallard and other similarly situated attorneys. Section 1915(d) should be construed as more appropriately contemplating a voluntary appointment power rather than a mandatory appointment power in light of important public policy considerations which favor (i) treating all similarly circumstanced attorneys in an equal manner and (ii) requiring that the cost of public programs be borne by

all members of society.

C. Compelling an Attorney To Undertake a Representation Without Compensation Constitutes an Unconstitutional Taking of Property

There is no provision for compensation to attorneys representing indigents under 28 U.S.C. Section 1915(d).[3] This lack of compensation, when coupled with the mandatory appointment power, creates serious doubt as to the constitutionality of Section 1915(d) under the "takings" clause of the Fifth Amendment.

Before undertaking a rigorous analysis of the "takings" clause in the context of this case, it should be noted

3 The underlying case involves claims by plaintiffs under 42 U.S.C. Section 1983. 42 U.S.C. Section 1988 provides for the recovery of fees in successful Section 1983 cases. However, there can be no assurance that the plaintiffs will prevail or that Petitioner Mallard, if compelled to serve, would ultimately receive any compensation.

that the failure to provide for compensation presents non-constitutional grounds for construing Section 1915(d) as authorizing only voluntary appointments. After comparing the language of Section 1915(d) with the language of other federal statutes providing for appointment of counsel, the Court of Appeals for the Ninth Circuit reasoned as follows:

> [I]f a statute intends appointment of counsel, it often makes provision for paying such counsel. See, e.g., 18 U.S.C. Section 3006A(d); 25 U.S.C. Section 1912(b) (1982). No statute provides funds to pay counsel secured under 28 U.S.C. Section 1915(d).

United States v. 30.64 Acres of Land, 795 F.2d 796, 801 (9th Cir. 1986). Because Congress has often made provision for the payment of appointed counsel, the Ninth Circuit reasons that, in general, Congress does not intend to impose a mandatory appointment obligation upon an

attorney in those instances involving statutes, such as 28 U.S.C. Section 1915(d), which do not provide for compensation. In addition to the use of this comparative statutory analysis, public policy considerations which weigh against involuntary servitude and in favor of "life, liberty, and the pursuit of happiness," support a presumption in the face of statutory ambiguity that any performance of public service should be justly compensated.

Private property may not be taken for public use, without just compensation. U.S. Const. amend. V. Any services rendered by an attorney who has received a mandatory public appointment under Section 1915(d) benefit the public because they follow and support the determination of Congress to make legal representation available to indigent

persons. An attorney's services constitute "private property" within the meaning of the Fifth Amendment. See Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957). See generally Stevens, Forcing Attorneys to Represent Indigent Civil Litigants: The Problems and Some Proposals, 18:3 J.L.Ref. 767, 782-783 (1985).

In view of the above, a mandatory appointment under Section 1915(d) violates the Fifth Amendment if there is a "taking." Courts have formerly reasoned that there is no "taking" because attorneys are officers of the court and are already obliged by the traditions of the profession to render public service upon appointment by a court. United States v. Dillon, 346 F.2d 633 (9th Cir. 1965); Tyler v. Lark, 472 F.2d 1077 (8th Cir.), cert. denied sub nom. Beilenson v.

Treasurer of U.S., 414 U.S. 864 (1973). But these opinions rely upon faulty historical analysis and give undue weight to this Court's statement in Powell v. Alabama, 287 U.S. 45, 73 (1932) that: "[a]ttorneys are officers of the court, and are bound to render service when required by such an appointment." The statement in Powell was dicta, and the Court's conclusion that attorneys owe an obligation based upon their role as officers of the court was based on the treatise of Thomas Cooley, a British rather than American legal authority.

In 1980, Harvard law professor David Shapiro undertook an historical analysis of the authority of the British and American courts to compel an unwilling private attorney to represent an indigent and concluded as follows:

> To justify coerced, uncompensated legal services on the basis of a

> firm tradition in England and the United States is to read into that tradition a story that is not there. The occasions on which lawyers have given their time and abilities at little or not cost--either on their own initiative or at a court's request--are surely beyond counting. And the sense that doing so is a fulfillment of a high professional aspiration has often been expressed. [Fn. omitted.] But the notion that an unwilling lawyer could be forced to serve without fee, though not without its advocates over the centuries, seems never to have found universal acceptance. At least before the latter part of the nineteenth century, that notion is even harder to document in particular instances than it is to support with general pronouncements like Chief Justice Hale's and Thomas Cooley's. (Shapiro, The Enigma of the Lawyer's Duty To Serve, (1980) 55 N.Y.U.L. Rev. 735 at page 753).

The precedents cited in Dillon and other cases that seemingly support a court's power to conscript an unwilling attorney on the notion that an attorney is an "officer of the court," are based upon a misunderstanding of the structure of the British court system.

> "The role of the English 'attorney' has no counterpart in this country.

> Unlike barristers [the counterpart of American lawyers], attorneys 'were admitted directly by the judges of the court' and medieval statutes gave the court direct control over these officers. [citation]. The role of the attorney, as an officer of the court, resembled the role performed by staff members in the court engaged in ministerial duties. [citation]" (State ex rel. Scott v. Roper, 688 S.W.2d 757, 765 (Mo. 1985).

In a recent consideration of the authority of a court to compel an unwilling private attorney to serve without just compensation, the Kansas Supreme Court relied upon Professor Shapiro's historical analysis and summarized its conclusions as follows:

> In 55 N.Y.U. L. Rev. at 756, it is found that 35 American jurisdictions had addressed the question of whether free indigent defense services is an enforceable duty upon the private bar. In a bare majority, eighteen jurisdictions, the law imposed an unqualified enforceable duty. Many of the cases cited, attributed to the eighteen majority jurisdictions, predate the turn of the century. One state, Alaska, has since overruled its former "majority" case, Jackson v. State, 413 P.2d 488 (Alaska 1966), and now holds that a private attorney cannot be compelled to represent indigent criminal defendants without just compensation. De Lisio v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987). The pendulum has swung, and the "bare majority" now holds that free indigent defense services is not an enforceable duty of the private bar. (State ex rel. Stephan v. Smith, 242 Kan. 336, 359; 747 P.2d 816, 835 (1987)).

Based upon the foregoing revisionist history, this Court should reject the reasoning in Dillon that a lawyer, as an officer of the court, has consented to and assumed an obligation to accept appointments without compensation. United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965). Lawyers have no such traditional obligation and such concept is nowhere clearly understood or expressed so as to make it fair to assume that lawyers have waived the express protections of the "takings" clause of the Fifth Amendment.

In conclusion, compelling a lawyer to render services without compensation constitutes a taking of his private property in contravention of the Fifth Amendment. Therefore, Section 1915(d) must be construed as authorizing only a voluntary appointment power because such a construction avoids serious questions regarding the constitutionality of Section 1915(d).

CONCLUSION

For these various reasons, 28 U.S.C. Section 1915(d) should not be construed as empowering the District Court to require Mallard to undertake the representation of the plaintiffs in the case of Mark Allen Traman, et al. v. Steve Parkin, et al. The judgment of the Court of Appeals should be reversed and a writ of mandamus should be issued directing the District Court to grant the

petitioner's motion to dismiss his appointment.

Respectfully submitted,

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